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MICHAEL RODAK, JR., CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1460

N S. KIRBY, d/b/a QUIK-CHEK OF INDIANA AND QUIK-CHEK, INC.,

Petitioner,

vs.

P. R. MALLORY & CO. INC.,

Respondent.

ETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

e opinion of the Court of Appeals is now reported at 489 1 904.

QUESTIONS PRESENTED

Whether the Court of Appeals erred in holding that Petitioner's complaint failed to give notice of his intention to assert a § 3 Clayton Act claim.

Whether the Court of Appeals erred in deciding that the District Court did not abuse its discretion in refusing to allow an amendment to the complaint on motion filed after completion of substantial discovery, after almost

three years' delay following discovery of the fact that gave rise to the amendment, and after it became apparent to petitioner he would lose on his only properly pleaded claim.

III. Whether the Court of Appeals erred in ruling, consistently with the other Courts of Appeals, and with the rationale in *FTC* v. *Fred Meyer Co.*, 390 U. S. 341 (1968), that § 2(e) of the Robinson-Patman Act is intended to protect customers competing for resale on the same functional level.

STATEMENT OF THE CASE

Respondent accepts Petitioner's statement of the case (Pet. 4-7) with the following exceptions and modifications: Petitioner is a rack jobber of Eveready batteries and sales to Hook constituted over 50% of his business. Respondent is a primary competitor of Eveready in the manufacture of batteries. Prior to the subject agreement, it had sought Hook's business for years but had been rebuffed since, unlike Petitioner, it offered sales without service. In late 1967 or early 1968, Hook altered its policy and decided to service its own battery display racks. It requested bids from Petitioner, Respondent and Eveready for the sale of batteries and ultimately accepted Respondent's offer.

There is no evidence that after entering into the agreement, Hook purchased batteries "exclusively" from Respondent. All evidence is to the contrary. Even Petitioner testified in his deposition that he was still supplying some batteries to Hook. As set forth in the letter agreement, Respondent's terms to Hook (a direct-buying retailer) were the same as those offered Petitioner (a wholesaler) with three exceptions: Hook was given a cooperative advertising allowance of up to 7½% of Hook's net purchases from Respondent; Hook was to be "tagged" in 62½% of Respondent's Indianapolis radio adver-

g per year; and Hook was to be paid the construction costs attery display racks conforming to Hook's decors.

ne agreement was effected on September 10, 1968, but the erative advertising allowance aspect was terminated on mber 31, 1968, in response to this Court's opinion in v. *Fred Meyer Co.*, 390 U. S. 341 (1968). The allow- Respondent offered to Hook was offered to other direct- ng retailers on a proportionally equal basis but not whole- s. Similarly, Respondent tagged on a proportionally equal its largest retailers (both direct-buying and wholesalers' omers), in the Indianapolis market, but that offer was not ded to anyone outside the Indianapolis market.

ne complaint in this action was filed September 24, 1968. ons for summary judgment were filed by both parties and d on January 18, 1971. On September 21, 1971, the ict Court granted Respondent's motion for reconsideration. October 4, 1971, Petitioner moved to amend his complaint on October 6, 1971, filed his motion for reconsideration.

SONS WHY THE CAUSE SHOULD NOT BE REVIEWED BY THIS COURT

I.

Court of Appeals Properly Held Petitioner's Complaint iled to Give Notice That a Clayton Act Claim Based on Purported "Exclusive-Dealing" Arrangement Would Be serted for the First Time Three Years Into the Lawsuit.

titioner's multi-pronged, disjointed attack on the Court of eals' disposition of his asserted Clayton Act exclusive- ng claim misconstrues its holding and evidences his mis- eption of the barest necessities of notice pleading. This n was instituted on September 24, 1968, by complaint h grounded "arising under" jurisdiction in the District

Court on "the Clayton Act . . . as amended by the Robinson-Patman Act . . . as hereinafter more fully appears." (Pet. App. A-10) The substance of the single-count claim, as noted by the Court of Appeals, was that "Defendant . . . contracted to sell Defendant's products to said Hook Drug Co., Inc. at prices below which products of like grade and quality are sold to Plaintiffs. . . . The Defendant in selling batteries at such unreasonably low prices with the purpose and intent to destroy competition and to eliminate one or more competitors has violated 15 U. S. C. A. Section 13." (Pet. App. A-11)

The Court of Appeals held that neither the "mere formal citation to the Clayton Act to focus attention on its amendment, the Robinson-Patman Act" nor the recitation of the quoted circumstances relating "to price discrimination proscribed by the Robinson-Patman Act" constituted sufficient notice to Respondent to answer or to prepare for trial on a § 3 Clayton Act exclusivity issue, 15 U. S. C. § 14 (1970). (Pet. App. A-10, A-11) Indeed, Petitioner must have recognized the lack of notice in his complaint since he unsuccessfully attempted to amend it three years after filing his complaint to allege a specifically-pleaded "exclusive-dealing" claim.

Petitioner attempts to confound the Court's holding, however, by arguing that the doctrine of judicial notice makes it unnecessary to plead any act of Congress in a complaint. He contends, therefore, that the Court's decision establishes an "irrevocable conflict" with "61 Am. Jur. 2d, Pleading Sec. 9". (Pet. 8-9) But the Court did not rule that citation to a federal statute is a prerequisite to the assertion of a claim. Rather it properly held that Petitioner's complaint failed to give any notice that three years after the filing of the lawsuit, Petitioner intended to assert, for the first time, an exclusive-dealing claim grounded in § 3 of the Clayton Act. No conflicting decision with this holding has been cited and its significance in light of Petitioner's inadequate pleading has not been established.

Even in the absence of sufficient notice to put the Clayton Act claim in issue, Petitioner contends here as he contended in the Court of Appeals that the facts were in issue and should have been considered by the District Court. (Pet. 9) The "facts as developed during pre-trial discovery" upon which Petitioner has seized as putting a § 3 Clayton Act violation in issue consist of the use of the words "exclusive" and "exclusively" in the letter dated May 2, 1968, setting forth the terms of the agreement between Respondent and Hook.[1] No evidence was adduced, however, showing that Hook, in fact, purchased Respondent's batteries to the exclusion of others. Petitioner, himself, testified in a deposition taken November 4, 1968, that he was still selling some batteries to Hook. Moreover, during the over two and one-half years of discovery in this action, none of the kinds of relevant market and market foreclosure facts necessary to prove or disprove an allegation of exclusive dealing in violation of the Clayton Act were evinced.[2]

Thus, for Petitioner to contend that the facts were in issue and should have been considered belies the record. And for him to argue that the mere existence of the words "exclusive" and "exclusively" in a letter provides a sufficient fact for the District Court to seize upon, *sua sponte*, for a determination of a § 3 violation indicates his lack of appreciation of the complexities of such litigation.

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1. Interestingly, Petitioner's proposal was for Hook to buy its batteries *exclusively* from Petitioner.

2. § 3 of the Clayton Act, 15 U. S. C. § 14 (1970) proscribes "exclusive-dealing" arrangements only "where the effect of such ... agreement ... may be to substantially lessen competition or tend to create a monopoly in any line of commerce." The Supreme Court has adopted different tests to establish such a violation, each demanding different facts. See, *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U. S. 320 (1961) and *Standard Oil Co.* v. *United States*, 337 U. S. 293 (1949). Whatever need be shown to find a violation, at a minimum it must be more than the existence of the words "exclusive" or "exclusively" in a letter.

II.

The Court of Appeals Did Not Err in Finding No Abuse of Discretion in the District Court's Denial of the Motion to Amend the Complaint.

Petitioner urges that the Court of Appeal's affirmance of the District Court's denial of leave to amend the complaint conflicts with Fed. R. Civ. P. 15(b) and *SEC* v. *Rapp*, 304 F. 2d 786 (CA 2 1962). (Pet. 9) Rule 15(b) (and *Rapp* applying it) requires as a precondition to its operation that "issues not raised by the pleadings [be] tried by express or implied consent of the parties. . . ." There was no trial on any Clayton Act issue in the case at bar, and Petitioner neither argued to the Court of Appeals nor does he contend here that Respondent expressly or impliedly consented to trial on any such issue. Implicit in the Court of Appeal's observation that Petitioner's reliance on the Clayton Act would necessitate additional discovery (Pet. App. A-12) is its recognition that evidence on the exclusive-dealing claim, far from being expressly or impliedly tried, had scarcely been mentioned during pre-trial discovery.

Petitioner's proper approach to raise that issue was by timely amendment of his complaint pursuant to Fed. R. Civ. P. 15(a). The grant of leave to amend is in the sound discretion of the trial court. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U. S. 321, 330 (1971). But Petitioner chose to assert his claim for the first time in a motion to amend filed approximately three years after the facts to which the amendment related were known to him and, by his own admission, after he anticipated foreclosure of his Robinson-Patman claim. Cf., *Vine* v. *Beneficial Finance Co., Inc.*, 374 F. 2d 627 (CA 2 1967), *cert. den.*, 387 U. S. 970 (1967); *Fowler* v. *Sponge Products Corp.*, 246 F. 2d 223 (CA 1 1957). In view of the extensive pre-trial discovery that had already been completed and the unjust burden on respondent that allowance of such a material amendment would have wrought, the Court of Appeals

roperly ruled that the District Court did not abuse its dis-retion in denying his motion. Cf., *Zenith Radio Corp.* v. *Hazeltine Research, Inc., supra,* at 330-331; *Vickery* v. *Fisher Governor Co.,* 417 F. 2d 466 (CA 9 1969); 3 J. Moore, *Federal Practice* ¶ 15.08(4) n. 5, 6 and cases therein cited.

III.

The Court of Appeals Properly Applied the Long-Established Rule That § 2(e) of the Robinson-Patman Act Is Intended to Protect Customers Competing for Resale on the Same Functional Level.

Petitioner complains that the District Court and the Court f Appeals erroneously limited coverage of § 2(e) of the Robinson-Patman Act to be coterminous with § 2(d), 15 J. S. C. §§ 13(e) and 13(d). In support of his complaint e musters only a semantic argument, failing to give recognition o substantive similarities between § 2(e) and §2(d), and dis-laying his misunderstanding of the import of the rationale of his Court in *FTC* v. *Fred Meyer Co.,* 390 U. S. 341 (1968). Pet. 10-12)

In *Meyer,* the FTC argued, in part, that because Congress ad used the language in § 2(d) that promotional allowances ere to be accorded on proportionally equal terms to "cus-omers competing in the distribution" of a supplier's product, ather than merely to customers competing in resales, whole-alers and a direct-buying retailer were "competing" as that erm is used in the statute. The Court rejected that argument aying, at 356-357:

> "While it cannot be doubted that Congress reasonably could have employed such a broad concept of competition in § 2(d), we do not believe that the use of the word 'distribution' rather than 'resale' is a clear indication that it did. . . . [The Congressional illustrations] strongly suggest that the competition with which Congress was concerned in § 2(d) was that between buyers who competed

> in *resales* of the supplier's products. And, as stated above, Congress' objective was to assure that all sellers, regardless of size, competing directly for the same customers would receive even-handed treatment from their suppliers. We noted in *FTC* v. *Sun Oil Co.*, 371 U. S. 505 (1963), that when Congress wished to expand the meaning of competition to include more than *resellers* operating on the same functional level, it knew how to do so in unmistakable terms. . . ." (Emphasis added, footnote omitted.)

The Court went on to explain that § 2(a) was more expansive than § 2(d) because of statutory language unrelated to the words "resale" or "distribution." Instead of the Court of Appeals' decision conflicting with the rationale of *Meyer*, the use of the word "resale" in § 2(e) presents a more compelling case for the determination that only customers competing for resale on the same functional level are provided the protection of the statute.

Petitioner is unable to cite any authority conflicting with the holding of the Court of Appeals. As it points out, § 2(e) has consistently been viewed as coterminous with § 2(d), see, *e.g.*, *American News Co.* v. *FTC*, 300 F. 2d 104, 109 (CA 2 1962); *Elizabeth Arden, Inc.* v. *FTC*, 156 F. 2d 132 (CA 2 1946), *cert. den.*, 331 U. S. 806 (1947); 82 Harv. L. Rev. 63, 269-270 (1968); F. Rowe, *Price Discrimination Under the Robinson-Patman Act*, 390 (1962), and the § 2(e) prerequisite of directly-competing purchasers is an established principle. *Centex-Winston Corp.* v. *Edward Hines Lumber Co.*, 447 F. 2d 585, 588 (CA 7 1971); *cf.*, *FTC* v. *Simplicity Pattern Co.*, 360 U. S. 55, 62-63 (1959).

CONCLUSION

Petitioner has failed to demonstrate that the decision of the Court of Appeals conflicts with decisions of other Courts of Appeals or with any decisions of this Court. He has failed to show how a Court of Appeals holding that is consistent with long-standing history of interpretation of § 2(e) of the Robinson-Patman Act presents an important question for resolution by this Court. Further, he has failed to establish that the Court of Appeals rulings that the complaint did not give notice of the exclusive-dealing claim and that the District Court did not abuse its discretion in denying an untimely prejudicial motion to amend so deviated from standard practice as to present an important supervisory question for this Court. For the foregoing reasons, Respondent respectfully requests that the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit be denied.

Respectfully submitted,

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